(iv) An error in law apparent on the face of the record."

In this case the question of the probate officer exercising his discretion does not arise. It seems to me only grounds (i) and (v) would have to be considered. In my view the said Ordinance (and in particular section 4) does not clothe the probate officer with power to make such an order as the one he made on 25th August, 1962. The exercise of such power is tantamount to the making of a declaration of the rights of persons interested in the estate. The probate officer could exercise his discretion to administer the estate only if there is no person competent or willing to administer the same. Here letters of administration were granted to applicant in preference to Suhaili bin Haji Drahman whom he apparently considered unfit to act. There is provision under section 29 of the said Ordinance for executor or administrator to refer to court for settlement any question arising in the course of winding up the estate. The rules of the Supreme Court are also of considerable assistance on procedural aspects. In the circumstances I hold that the probate officer should not have made the order for want of jurisdiction.

The dispute was clearly improperly brought before the probate officer who should have declined to assume jurisdiction. It would be better if he concerns himself as to whom the letters of administration should be granted. Once that is done he may advise the person to whom the letters of administration has been granted of the provision under section 29 of the said Ordinance.

The probate officer had taken considerable trouble to seek expert advice on the matter before he made his decision. It may well be that his decision touching the rights of the parties is correct and in accordance with the native customary law relating to the Malay community in Sarawak.

However in my judgment I consider the order made by the probate officer dated 25th August, 1962 was *ultra vires*. That order will therefore be quashed. Accordingly the applicant is entitled to the order he seeks and costs to be paid out of the estate.

Application granted.

SIM KHOON SENG v. THIO ENG THENG

[O.C.J. (Choor Singh J.) August 28, 1965]

[Singapore — Suit No. 1566 of 1962]

Landlord and Tenant — Duty to repair — Abatement order made against premises — Whether landlord owes a duty to repair — Whether failure to do so constitutes breach of covenant for quiet enjoyment — Whether landlord liable for negligence or nuisance in the circumstances.

The plaintiff claimed a declaration that he was the tenant of the defendant in respect of a part of house No. 3 Evelyn Road, Singapore, a mandatory order, injunctions and damages for breach of covenant for quiet enjoyment, nuisance and negligence. The house was originally let by the defendant to one Sim Beng Tee, who in turn let out one of the rooms in the basement of the premises to the plaintiff. It was then agreed that the tenant should keep the premises in repair. After the death of Sim Beng Tee, his widow was accepted as a tenant by the defendant upon the same terms as applied to him. The widow subsequently agreed to give up vacant possession of the premises but the plaintiff refused to move out and continued to occupy the basement. The defendant however refused to accept the plaintiff as sub-tenant and to accept rent from him. The premises had fallen into considerable disrepair and an abatement order had been made in 1960 requiring the defendant to carry out certain repairs to the premises. This order had not been complied with by the defendant on the ground that the premises were not worth repairing and that it was not economical to carry out the repairs. The plaintiff alleged that as a result of the failure to carry out the repairs, the defendant had caused him annoyance, discomfort and damage.

Held: (1) when the widow of the original tenant gave up possession of the premises the plaintiff became a statutory tenant of the defendant in respect of the room in the basement;

(2) the neglect of the defendant to comply with the abatement order made under the Local Government Ordinance did not give the plaintiff whose property may have been injured by such neglect a right to have the abatement enforced and therefore the plaintiff was not entitled to a mandatory order to order the defendant carry out the repairs;

(3) as the contract in this case between the landlord and the tenant had provided that the tenant should keep the premises under proper repair, the defendant was under no obligation to repair the premises and therefore there had been no breach of the covenant for quiet enjoyment by his failure to repair and further the defendant could not therefore be liable for negligence to the plaintiff;

(4) the defendant as the landlord of the premises could only be liable for negligence and for injury to persons or property on the demised persons resulting from the non-repair of the premises if he was in actual occupation of the premises and as in this case the defendant was not in occupation or control of the premises, he was not liable for negligence in this respect;

(5) the plaintiff's claims for injunctions must be dismissed as there was no evidence that the defendant or anybody had prevented the plaintiff or members of his family from entering or occupying the premises or that the plaintiff was required to vacate the premises to enable repairs to be carried out.

Cases referred to:—

(1) *Robinson* v. *The Mayor and Corporation of the Burrough of Workington* [1897] 1 Q.B. 619.

(2) *Cavalier* v. *Pope* [1906] A.C. 428.

CIVIL SUIT.

K. K. Bezboruah for the plaintiff.

C. H. Smith (*Lim Seow Beng* with him) for the defendant.

Cur. Adv. Vult.

Choor Singh J.: In this suit, the plaintiff claims a declaration that he is the tenant of the defendant in respect of a part of house No. 3 Evelyn Road, Singapore, a mandatory order, two injunctions and damages for (1) breach of

covenant for quiet enjoyment, (2) nuisance, and (3) negligence.

The house is a bungalow, with the floor raised above the ground and supported by pillars. It is built on a slope, and the floor is about seven feet above the ground at the front but touches the ground at the rear. Under the front portion of the floor is a basement consisting of two rooms with a hall between them. These two rooms have a ceiling 6 ft. 9 ins. high and were built for use as a store-room and not for human habitation.

The defendant purchased the premises during the Japanese occupation of Malaya. After the liberation, he let them out at a rent of $85 p.m. to one Sim Beng Tee, who was to repair and keep them under proper repair.

In November 1957 Sim Beng Tee let one of the rooms in the basement to the plaintiff at $50 per mensem for use in connection with the plaintiff's business.

Sim Beng Tee died on the 14th May 1958. His widow, Ng Meow Keng, was accepted as a tenant by the defendant upon the same terms as applied to him.

In December 1961 the widow agreed to give up vacant possession of the whole premises to the defendant in consideration of his paying her $6,000. The defendant deposited this sum with his solicitors, which was to be paid to her when she gave vacant possession of the whole premises. On the 11th September 1961 she and her family removed from the premises; but the plaintiff refused to move out and proceeded to occupy the whole basement.

When Ng Meow Keng removed from the premises, the defendant refused to accept the plaintiff as a tenant and to accept rent from him.

The premises are 60 to 70 years old and have fallen into considerable disrepair. The roof has caved in in several places and the ceiling has collapsed. Rain water falls on to the floor and through the floor into the basement. The floor boards are in a terrible condition, and the whole roof, the whole floor, all the floor beams and all the joists have to be changed. In the words of the architect called by the plaintiff, "all that can be used are the pillars and the walls. There is not a piece of wood worth retaining. That is why it would cost $20,000 to $25,000 to repair the house".

The City Council took proceedings against the defendant in 1960 under the Local Government Ordinance for abatement of nuisance, and an abatement order was made by a magistrate's court requiring the defendant to carry out certain repairs to the premises. This order has not been complied with by the defendant on the ground that the premises are not worth repairing and that it is not economical to carry out the repairs.

The plaintiff alleges that as a result of the failure to carry out the repairs mentioned in the abatement order, the defendant has caused him annoyance, discomfort, loss and damage.

The defendant's case is that he owes no duty whatsoever to the plaintiff in connection with the premises and that the plaintiff has no right of action against him.

The premises come within the purview of the Control of Rent Ordinance. The first question that falls to be decided is whether or not the plaintiff is the tenant of the defendant. It was submitted on behalf of the plaintiff that when Sim Beng Tee died, his widow became a statutory tenant, and when she removed from the premises, the plaintiff became a statutory tenant of the defendant. Counsel for the defendant, on the other hand, made this submission: the widow was granted a new tenancy; she removed from the premises without giving up her tenancy; she remains a tenant of the defendant until she gives up vacant possession of the whole premises; it is immaterial that she has not paid rent to the defendant from the day she moved out; she is still the plaintiff's landlord; and the plaintiff is not a tenant of the defendant.

In my view, the widow abandoned her tenancy when she removed from the premises, and ceased from then to be the landlord of the plaintiff. This is borne out by the fact that she never demanded rent from the plaintiff subsequently. In my opinion when she gave up her tenancy, the plaintiff became a statutory tenant of the defendant in respect of the room in the basement rented to him by Sim Beng Tee. This I find to be the room on one's left as one faces the house from the front. I make a declaration accordingly.

The plaintiff's second prayer is for a mandatory order that the defendant do forthwith carry out the repairs to the premises specified in the abatement order. In my opinion neglect to comply with an abatement order made under the Local Government Ordinance does not give an individual whose property may have been injured by such neglect a right to have the abatement order enforced. There is support for this view in *Robinson* v. *The Mayor and Corporation of the Burrough of Workington*,[1] where Lord Esher M.R. said at page 621:—

> "If it were not for the statute, there would be no duty on the defendants to do anything in the matter, and a default on their part is dealt with by a remedy provided by the same statute. I have no hesitation in saying that this is the only remedy which is available. It has been laid down for many years that, if a duty is imposed by a statute which but for the statute would not exist, and a remedy for default or breach of that duty is provided by the statute that creates the duty, that is the only remedy."

In my judgment the plaintiff is not entitled to the mandatory order that he seeks.

The plaintiff's next prayer is for an injunction to restrain the defendant, his servants and agents from preventing the plaintiff, the members of his family, his servants and licensees from entering and occupying the said premises. There is no evidence before the court that the defendant or anybody on his behalf has prevented or attempted to prevent the plaintiff or members of his family, his servants and licensees from entering or occupying the premises. The plaintiff is therefore not entitled to the injunction that he seeks.

The next prayer of the plaintiff is for an injunction to restrain the defendant, his servants and agents from preventing the plaintiff, his servants agents licensees and the members of his family from re-entering the said premises when repairs have been effected if the plaintiff vacates the said premises for that purpose. There is no evidence before the court that the plaintiff is required to vacate the premises to enable repairs to be carried out. He is therefore not entitled to this injunction.

The plaintiff's claim for damages is based on three heads of liability: (1) breach of covenant for quiet enjoyment (2) nuisance (3) negligence.

It is alleged that the defendant failed and neglected to carry out the necessary repairs to the premises and "large quantities of water had penetrated and flowed into the said premises and wetted and damaged the plaintiff's goods. By reason thereof the plaintiff had been prevented from peacefully holding the said premises and the defendant is in breach of the covenant for quiet enjoyment whereby the plaintiff has suffered loss and damage".

In my judgment, there has been no breach of the covenant for quiet enjoyment by the defendant's omission to repair the premises because he is under no legal obligation to the plaintiff to do so. I would add that the defendant's failure to comply with the abatement order does not constitute a breach of the covenant for quiet enjoyment.

In considering the plaintiff's claim for damages for nuisance, it must be borne in mind that the liability of a landlord to his tenant usually depends on contract. It must also be borne in mind that the defendant is under no contractual duty to any one to repair the premises, for he expressly contracted with his tenant, Sim Beng Tee, that the latter should keep the premises under proper repair. It is settled law that a landlord is liable to third persons for the existence of a nuisance upon premises which are in the occupation of his tenant, where the nuisance arises during the tenancy from the dangerous state of the premises, only when he has contracted to repair, or he has expressly reserved the right to enter and repair, or he has an implied right to enter and repair; see *Halsbury's* Laws of England, third edition, volume 23, page 570. In my opinion, a statutory tenant is not a third person, and this principle cannot be invoked by him even if it is conceded that when the widow, Ng Meow Keng, moved out, the defendant as landlord had an implied right to enter and repair the premises. In the circumstances the claim of the plaintiff against the defendant for damages for the tort of nuisance must fail.

I shall now deal with the claim for damages for negligence. Where the landlord is under no express or implied obligation to maintain or repair the demised premises, he is not liable in negligence or otherwise, either to his tenant or to any other person entering the premises during the term, for any defect in the premises rendering them dangerous or unfit for occupation even if he has constructed the defects himself or is aware of their existence: see *Halsbury's* Laws of England, third edition, vol. 23, page 572. In the present case, the defendant is under no express or implied obligation to maintain or repair the premises: he is therefore not liable in negligence to a statutory tenant for defects rendering the premises unfit for occupation even if he is aware of their existence. The plaintiff's claim for damages for negligence therefore fails.

It is submitted by counsel for the plaintiff that when the tenant's widow, Ng Meow Keng, removed from the premises, possession of that part of the premises which was occupied by her reverted to the defendant; that the defendant has since that day been in occupation and control of such part of the premises; and that as rain water flows or escapes from that part of the premises, which is now in the occupation and control of the defendant, into the basement, which is occupied by the plaintiff, the defendant is liable to the plaintiff in damages for (1) breach of covenant for quiet enjoyment, (2) nuisance and (3) negligence.

The law would appear to be that where the landlord retains possession of part of the premises, such as the roof or one floor of a building, his liability for injury to persons or property on the demised premises resulting from the non-repair of that part depends, not upon any contractual obligation to repair, but upon negligence, the ordinary duty of an occupier of property to take reasonable care that his property does not become dangerous to adjoining property or to persons lawfully thereon. The House of Lords has held that for a landlord to be liable for negligence, he must be in actual possession of the premises and that constructive possession is not sufficient for this purpose:

Cavalier v. *Pope*.[2]

The evidence in this case does not support the plaintiff's contention that the defendant is in occupation and control of that part of the premises which was formerly occupied by the widow, Ng Meow Keng. She vacated the premises three and a half years ago and the defendant has not occupied the part vacated by her. He refuses to do so on the ground that his agreement with the widow was that she would give vacant possession of the whole premises and until she does that he will not take possession of the premises. I hold that the defendant is not in actual occupation of any part of the premises. Under the circumstances I do not see how he could be held liable for negligence or nuisance or breach of covenant for quiet enjoyment.

There is one other aspect of this case to be considered. The motive for this action by a sub-tenant is to get the premises repaired by the owner who had expressly contracted with his tenant that the tenant would be responsible for all repairs. But for the Control of Rent Ordinance, the plaintiff would have been ejected from the premises some three and a half years ago. Is it fair and equitable that the owner of the premises should now repair it at a cost of $25,000 for the convenience of the plaintiff who cannot be compelled to pay a rent of more than $50 per mensem but who may apply to the Rent Conciliation Board to have the rent reduced? In my view, in the circumstances of this case, it would be most inequitable to compel the defendant to repair the premises at such great cost when the premises are in fact more suitable for demolition.

For the above reasons I dismiss the plaintiff's claim, except in so far as it seeks a declaration. The plaintiff is ordered to pay to the defendant the costs of this action.

Claim dismissed.

Solicitors: *K. K. Bezboruah; Boswell Hsieh & Lim.*

LAGA v. UGING & ANOR.

[O.C.J. (Lee Hun Hoe J.) August 30, 1965]

[Sibu — Civil Suit No. 63 of 1964]

Land — Lease of Crown land — Indefeasibility of title — Dayak customary law — Tusun Tunggu.

The plaintiff sought a declaration that the land held by the first defendant under lease of Crown Land belonged to him by virtue of the fact that his late father held the said land under occupation ticket. The plaintiff was unable to show that the piece of land was the one held by his father. He alleged that the land office had made a mistake but did not allege fraud on the part of the first defendant.

Held: the first defendant's title was indefeasible except in the case of fraud and as the plaintiff did not dispute the first defendant's title and did not allege fraud on his part, the declaration sought must be refused.

Consideration of Dayak custom and whether land held under title by a Dayak may be disposed of by him.

Case referred to:—

(1) *Sak anak Akum & Anor.* v. *Randong Anak Chararenq* [1958] S.C.R. 104, 108.

CIVIL SUIT.

S. Sahathevan for the plaintiff.

J. V. Nayar for 1st defendant.

Lee Hun Hoe J.: This is an unusual case. Plaintiff is asking for a declaration that the land held by the first defendant under Lease of Crown Land situate in the Maradong Land District and known as Lot No. 386 containing 3.35 acres (hereinafter referred to as Lot 386) belongs to him (plaintiff) by virtue of the fact that his late father Tunjan alias Kunjan held the said land under Occupation Ticket No. 10555 (hereinafter referred to as O.T.).

The O.T. was issued to Tunjan on 27th July 1928 under Land Regulations, Order No. VIII, 1920. He was allowed an area of 3 acres rent free at Bukit Grupkan, Sungai Gumuan, true left bank. The land was not surveyed. The following conditions were attached:—

"(i) A *bona fide* commencement to bring the land under cultivation must be made within three months from the date hereof;

(ii) The area specified above shall be brought under cultivation within a period of....

(iii) As soon as the above area has been cleared, or immediately after completion of planting, application to be made for survey;

(iv) Boundaries should be kept clear, failing which, cost of clearing at survey will be borne by occupant;

(v) The lease (or licence) will run for twenty years, renewable at occupant's option, for such term and at such rent as the Government may determine at the expiration of each term;

(vi) No encroachment to be made on other occupant's land or reserves, or on public paths."

Tunjan died during the Japanese occupation. Plaintiff said that he and his mother then worked on the land which is now occupied by first defendant. After Tunjan died plaintiff's mother kept the O.T. for some four years before she handed it to plaintiff. No survey had ever been carried out. The O.T. expired in 1948. It seems that when Tunjan died no letters of administration had ever been applied for.

Strangely enough it was some time in 1963 that plaintiff became aware that the said land was occupied by first defendant and he lodged a report with the district officer, Binatang. The matter was eventually referred to the land office, Sibu. An investigation was carried out. At the same time a caveat was lodged on the said land under section 182 of the Land Code Plaintiff was advised to institute proceedings in this court to establish his claim.